No. 334 Sy.

Brief of Pond for D. E.

531

The Supreme Court of the United States

Filed Mar. 29, 1897

MICHIGAN LAND & LUMBER COMPANY, LIMITED,
Plaintiff in Error,

vs.

CHARLES A. RUST, SURVIVOR, ETC.,
Defendant in Error.

Error to the Court of Appeals for the Sixth Circuit.

Memorandum of Argument of Asbley Pond for Defendant in Error.

DETROIT:
Record Printing Co., Free Press Bldg., 11 and 13 Lafayette Ave.,
1897.

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MICHIGAN LAND & LUMBER COMPANY, LIMITED, *Plaintiff in Error,* vs. CHARLES A. RUST, SURVIVOR, ETC., *Defendant in Error.*	*Error to the Court of Appeals for the Sixth Circuit.*

Memorandum of Argument of Ashley Pond for Defendant in Error.

In the trial court (the Circuit Court of the United States for the Eastern District of Michigan) the action was ejectment, Plaintiff in Error vs. Defendant in Error, to recover certain lands described, situate in the County of Clare, State of Michigan.

Plaintiff claimed title from the State of Michigan under patent to Edward W. Sparrow, dated October 14, 1887, and deed from Sparrow to it, dated October 31, 1887, and attributed the title of the State to the Act of Congress of September 28th, 1850, commonly known as the Swamp Land Grant Act.

Defendant claims title under patent from the United States issued subsequently to September 28th, 1850, to wit, May 10, 1870, which patent was based upon a purchase of said premises at a sale at public auction shortly before the date of such patent.

After both parties had introduced evidence and rested, the Court instructed the jury to render a verdict for the defendant. Judgment followed, and upon error that judgment was affirmed by the Court of Appeals.

Stated briefly, plaintiff's case was made by introducing in evidence:

(1) Copy of a communication dated November 21, 1850, from the then Commissioner of the Land Office, to the Surveyor-General of Michigan, the material part of which communication was as follows, to wit, *Exhibit 3 A, Record, p. 17:*

"General Land Office, November 21st, 1850.

"Sir—By an act of Congress entitled 'An act to enable the State of Arkansas and other States to reclaim the "swamp lands" within their limits,' approved September 28, 1850, it is directed 'That to enable the State of Arkansas to construct the necessary levees and drains to reclaim the swamp and overflowed lands therein, the whole of those swamp and overflowed lands made thereby unfit for cultivation, which shall remain unsold at the passage of this act, shall be, and the same are hereby granted to said State.'

"1st. By the 4th section of this act, it is directed that the provisions of it 'shall be extended to, and their benefits be conferred upon each of the other States of the Union in which such swamp and overflowed lands may be situated.'

"2nd. And 'that in making out a list and plats of the lands aforesaid, all legal subdivisions, the greater part

of which is "wet and unfit for cultivation," shall be included in said list and plats; but when the greater part of a subdivision is not of that character, the whole of it shall be excluded therefrom.'

* * * * *

"You will please make out a list of all the lands thus granted to the State, designating those which have been sold or otherwise disposed of since the passage of the law, and the price paid for them when purchased.

"*The only reliable data in your possession, from which these lists can be made out, are the field notes of the surveys on file in your office, and if the authorities of the State are willing to adopt these as the basis of those lists, you will so regard them; if not, and those authorities furnish you satisfactory evidence that any lands are of the character embraced by the grant, you will so report them.*

"*The following general principles will govern you in making up these lists, to wit:*

"Where the field notes are the basis, and the intersections of the lines of swamp or overflow with those of the public survey alone are given, those intersections may be connected by straight lines, and all legal subdivisions, the greater part of which are shown by these lines to be within the swamp or overflow, will be certified to the State, the balance will remain the property of the Government.

* * * * *

"You will make out lists of these lands as early as practicable, according to the following form, one copy of which you will transmit to the Land Office and another to this office. The lands selected should be reserved from sale, and after those selections are approved by the Secretary of the Interior, the Register should enter all the lands so selected in his tract books as 'Granted to the State by Act of 28th September, 1850, being swamp or overflowed lands.' And on the plats enter on each tract 'State, Act 28th September, 1850.' Copies of the approved lists will be sent to the Registers for this purpose.

"Your early attention is required in this matter, that the grant may be disposed of as speedily as possible.

"Very respectfully, your o'bt serv't,

"J. BUTTERFIELD,
"Commissioner."

(2) Copy of a communication under date of December 6, 1850, from the Surveyor-General of Michigan to the then Governor of Michigan, which is as follows, to wit—*Exhibit 4, Record, p. 19:*

"Surveyor-General's Office,'
"Detroit, December 6, 1850.

"His excellency John S. Barry:

"Sir—I have the honor herewith to inclose to you a copy of instructions to me to designate the swamp lands granted to the State of Michigan by the act of Congress approved September 28, 1850, entitled 'An act to enable the State of Arkansas and other States to reclaim the "swamp lands" within their limits.' To enable me to carry out the views of the government in making this grant, I have to request of you information:

"*1st. Whether the State authorities are willing to adopt the field notes of the surveyors on file in this office as the basis of the lists of all lands thus granted to the State, or*

"*2d. Whether the State authorities conclude to have the surveys made to determine the boundaries of the swamp or overflowed lands.*

"With great respect, I am your ob't serv't,

"CHARLES NOBLE,
"Sur.-General."

The material portion of these communications I have italicized as above. (*)

(*) An act was passed by the Legislature of the State of Michigan, approved June 28th, 1851, the first section of which reads as follows, to wit:

"*The People of the State of Michigan Enact:* That they adopt the notes of the surveys on file in the Surveyor-General's office as the basis on which they will receive the swamp lands granted to the State under date of September 28, 1850."

(3) Partial copy of a list of lands, dated March 29th, 1852, made by the then Surveyor-General for Michigan, and forwarded to the Commissioner of the Land Office at Washington—*Exhibit 26, Record, p. 36.* This list is headed "No. 1, Grand River Land District," and at its foot is the following certificate by the Surveyor-General:

"The above list of swamp lands in the Grand River Land District, which has been made up in accordance with the instructions from the General Land Office, dated Nov. 21, 1850, embraces all the lands in said district, except such as may be found in townships which have been ordered to be resurveyed. *The districts reported by Judge Burt and Hiram Burnham to be fraudulent are embraced in the list and marked 'F.'* "

(4) Partial copy of a list of lands purporting to be a certified copy of a list approved by the Secretary of the Interior, forwarded to the Governor of Michigan, approved Oct. 27, 1853, forwarded to the Governor, January 31, 1854.—*Exhibit 27, Record, p. 37.*

These lists contain the lands in dispute.

(5) Copy of map of the township containing the lands in dispute, and other lands, forwarded from the General Land Office to the Governor of Michigan, in connection with the above lists.—*Exhibit 32, Record, p. 47.*

(6) Some other evidence was introduced by the plaintiff, to which reference is made in the brief of my associate; but substantially the plaintiff's case rests upon the evidence above recited.

No attempt was made to show that the lands in dispute were in *fact* swamp and overflowed.

It appears by the record that the action of the Secretary of the Interior in refraining from issuing patents for these lands to the State, and causing them, after his ap-

proval of such lists, to be sold at public auction and patented to the purchaser at such sale, was based upon the fact that after such approval the township containing said lands was resurveyed, and it appeared by such resurvey that said lands were not in fact swamp and overflowed.

The contention on the part of the plaintiff is:

1. That the approval, by the Secretary of the Interior, of the lists containing the lands in dispute, and the sending of a copy of such lists to the Governor of the State, operated as a final and conclusive identification of said lands as enuring to said State under said act of September 28, 1850.

2. That the act of March 3, 1857, confirmed the title to said lands in the State.

That act provides that the selection of swamp and overflowed lands granted to the several States by the act of September 28, 1850, "made and reported to the Commissioner of the General Land Office so far as the same shall remain vacant and unappropriated, and not interfered with by an actual settlement under any existing law of the United States, be and the same are hereby confirmed and shall be approved and patented to the several States in conformity with the provisions of the act aforesaid as soon as may be practicable after the passage of this law." *11 U. S. Stat., p. 251.*

A clear understanding of the occasion for and the circumstances under which such resurvey was made, and of the action of the Secretary of the Interior and the authorities of the State with reference to the identification of the lands to which the State became entitled under said Act of September 28th, 1850, and the adjustment of

such grant, is necessary to an intelligent appreciation of the case on the part of the defendant.

The evidence upon these subjects is fully called to the attention of the Court by the brief of my associate, Mr. Hanchett, and sufficiently for the purpose of my argument in proper connection further on.

I.

The approval by the Secretary, of the lists containing the lands in dispute, did not operate as a final and conclusive identification of such lands as swamp and overflowed within the intent of said act of September 28th, 1850, and thus, *ipso facto*, vest the title to such lands in the State.

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1. It was, I submit, not only the right, but the duty, of the Secretary of the Interior, upon discovery, at any time before the issue of patent for lands described in a list approved by him and forwarded to the Governor of the State, that lands were included in such lists which were in fact lands to which the State was not entitled under said Act of September 28th, 1850, to eliminate such lands from such lists and to refuse to issue patents therefor.

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(1) The contention on the part of the plaintiff must and does go to the extent of asserting that the approval of

such lists containing such lands was such a complete and final determination that they were of the character described in said Act of September 28th, 1850, as to vest the title thereto in the State with like effect in every respect as a patent would so vest such title; and that, therefore, upon such approval, the title of the State was at once put beyond question except by a bill in equity by the United States.

This proposition, it will be seen, excludes the power of the Secretary of the Interior to make—even with the assent of the State—any correction in a list once approved by him, by striking out, before the issuance of patents, lands discovered to have been erroneously included in such lists. It just as effectively excludes the power in that regard of the Secretary who approved the list as of his immediate or remote successor.

This, I submit, is an exceedingly startling proposition and one to which no court will assent unless it finds itself compelled by some rigid rule of law, and that it is not so compelled seems to me to be entirely clear. No authority to maintain such proposition is produced or can be found. And the reasoning and intimations of this Court are the other way.

In *Knight vs. U. S. Land Association, 142 U. S., 161,* Mr. Justice Lamar, at page 178, quotes with approval from an opinion of the Secretary of the Interior (5 L. D., 494), as follows:

"The statutes in placing the whole business of the Department under the supervision of the Secretary, invest him with authority to review, reverse, amend, annul or affirm all proceedings in the Department having for their ultimate object to secure the alienation of any portion of the public lands, or the adjustment of private claims to lands, with a just regard to the rights of the public and of private parties. * * * For example, if, when

a patent is about to issue, the Secretary should discover a fatal defect in the proceedings, or that by reason of some newly ascertained fact the patent, if issued, would have to be annulled, and that it would be his duty to ask the Attorney-General to institute proceedings for its annulment, it would hardly be seriously contended that the Secretary might not interfere and prevent the execution of the patent. He could not be obliged to sit quietly and allow a proceeding to be consummated, which it would immediately be his duty to ask the Attorney-General to take measures to annul. It would not be a sufficient answer against the exercise of his power that no appeal had been taken to him and therefore he was without authority in the matter."

And this language was again quoted by Mr. Justice Brewer in *Orchard vs. Alexander, 157 U. S., 382.*

In *New Orleans vs. Paine, 147 U. S., 266,* Mr. Justice Brown says:

"Until the matter is closed by final action, the proceedings of an officer of a department are as much open to review or reversal by himself, or his successor, as are the interlocutory decrees of a court open to review upon the final hearing."

In *Barden vs. Northern Pacific R. R. Co., 154 U. S., 288,* Mr. Justice Field quotes with approval from an opinion of ex-Secretary Noble in Central Pacific R. R. Co. vs. Valentine, 11 Land Dec., 238-246, as follows:

"The very fact, if it be true, that the office of the patent is to define and identify the land granted, and to evidence the title which vested by the act, necessarily implies that there existed jurisdiction in some tribunal to ascertain and determine what lands were subject to the grant, and capable of passing thereunder. Now, this jurisdiction is in the Land Department, and it continues, as we have seen, until the lands have been either patented or certified to for the use of the railroad company. By reason of this jurisdiction it has been the practice of that department for many years past to refuse to issue patents to railroad companies for lands found to be mineral in character at

any time before the date of the patent. Moreover, I am informed by the officers in charge of the mineral division of the Land Department that ever since the year 1867 (the date when that division was organized), it has been the uniform practice to allow and maintain mineral locations within the geographical limits of railroad grants, based upon discoveries made at any time before patent or certification where patent is not required. This practice having been uniformly followed and generally accepted for so long a time, there should be, in my judgment, the clearest evidence of error as well as the strongest reasons of policy and justice controlling before a departure from it should be sanctioned. It has, in effect, become a rule of property."

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(2) The language of the Act of September 28th, 1850, is clearly inconsistent with any construction which makes the approval of a list by the Secretary final and conclusive as to the title of the State. Thus:

After making it the duty of the Secretary to make out lists and plats of the lands granted, and to transmit the same to the Governor of the State, and at his request to cause a patent to be issued to the State therefor, said Act continues: "*and upon that patent* the fee simple of the land shall vest in the State."

Now, some effect must be given to this language, and I submit that that effect must be to hold the identification of the lands granted as *in fieri* until the issue of patent. This is in no way inconsistent with the rulings heretofore made by this Court, that when lands are finally identified and patents issued, the title relates back to the date of the Act.

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(3) Again, had the Act of September 28th, 1850, not called for the issue of patents, and a list had been approved which contained lands not of the character granted, such lists as to such lands would have been absolutely void.

U. S. Revised Statutes, § 2449:

"That in all cases where lands have been, or shall hereafter be granted by any law of Congress to any one of the several States and Territories; and where said law does not convey the fee simple title of such lands, or require patents to be issued therefor; the lists of such lands which have been, or may hereafter be certified by the Commissioner of the General Land Office, under the seal of said office, either as originals, or copies of the originals or records, shall be regarded as conveying the fee simple of all the lands embraced in such lists that are of the character contemplated by such act of Congress, and intended to be granted thereby; but where lands embraced in such lists are not of the character embraced by such acts of Congress, and are not intended to be granted thereby, said lists so far as these lands are concerned, shall be perfectly null and void, and no right, title, claim or interest shall be conveyed thereby."

I submit that to make lists so void where the making of them is the *final* act to be performed by the land department and to hold them as unchangeable as the laws of the Medes and Persians, when such lists are required by the statute to be followed by a patent, is going beyond reason.

The case of *Noble vs. Union River Logging Railroad Company*, 147 U. S., 165, is distinguishable. The action of the Secretary of the Interior, the attempted revocation of which was there in question, was the *final action* with reference to the subject matter and vested title to the right of way in question with like effect as if a patent had

been required and issued, and a revocation of such action, if valid, would operate *to divest such title.*

After this argument was in manuscript, the opinion of this Court in the recent case of *The Rogers Locomotive Machine Works et al. vs. The American Emigrant Company,* handed down on the 7th of December last, came to my attention. It seems to fully sustain the foregoing contention. Mr. Justice Harlan, referring to the function to be performed by the Secretary of the Interior with reference to the identification of the lands granted to the States under the Act of September 28th, 1850, says:

"When he" (that is, the Secretary of the Interior) "made such identification, then, and not before, the State was entitled to a patent, and 'on such patent' the fee simple title vested in the State. The State's title was at the outset an inchoate one, and did not become perfect, as of the date of the act, until a patent was issued."

II.

The action of the Secretary of the Interior in withholding the lands in question from patent upon the ground that they were not swamp and overflowed and that therefore the State was not entitled to them, was with the knowledge and assent of the highest authority of the State, to wit, its Legislature, and hence such action is not now open to question by the State or by its grantee, even if otherwise it might be so.

This knowledge and assent clearly and conclusively appear by the evidence to which I now proceed to call attention.

As hereinbefore stated, the township containing the lands in dispute was, after the approval of the lists containing such lands, resurveyed, and the lands in dispute found by such resurvey not to be swamp and overflowed.

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1. *With reference to such resurvey and its effect upon the action of the Secretary of the Interior:*

(a) A joint resolution, approved February 1, 1842, was passed by the Legislature of the State of Michigan, of which the following is a copy:

"Joint Resolution requesting the President of the United States to cause the survey of certain townships of land.

"*Whereas*, it has been satisfactorily made to appear to this Legislature, that large districts of lands lying within the limits of the State of Michigan, have been returned by some of the deputy United States surveyors to the general land office, as surveyed, where no surveys whatever have been made, or where the surveys have been so imperfectly done as to be utterly valueless; *and whereas*, the United States Surveyor-General of this land district has caused the lands so represented as surveyed, to be offered for sale to the very great injury of the State of Michigan, and the citizens thereof, therefore,

"*Be it resolved by the Senate and House of Representatives of the State of Michigan*, That the President of the United States be requested to cause the subdivisions of the following townships of land situate within the State of Michigan, and which have been represented to have been surveyed, but which have either not been surveyed or have been so imperfectly surveyed that said work is valueless, to be surveyed at as early a day as may be consistent, viz: Towns sixteen and seventeen north, of range three east, and towns fifteen, sixteen and seventeen north, of range four east, and all the towns lying east of the principal meridian, from towns eighteen to twenty-five north, inclusive, and ranges five, six, seven, eight and nine east of town twenty-six north, and also towns sixteen, seven-

teen and eighteen north, of range six, seven and eight west, including in all eighty-one whole and fractional townships.

"*Resolved*, That the Governor be requested to submit the foregoing preamble and resolution to the President of the United States."

(b) The subject matter of said resolution was, by order of President Tyler, referred to the Surveyor-General at Cincinnati to investigate and report, and such Surveyor-General, after investigation, reported the facts with reference to such surveys to be substantially as in said resolution stated, and also that the surveys of a very large number of townships not mentioned in said resolution were of a similar character.

(c) Such surveys were found to be fraudulent not only in respect to the lines reported to have been run and courses established, but also with reference to the character of the land, some of the finest portions being represented indifferent, second and third rate, and sometimes swamp.

(d) By public records and statutes it appears that the attention of Congress was called (presumably by the Secretary of the Interior), to the imperfect and fraudulent character of such surveys, and that it authorized resurveys thereof to be made by the appropriation of large amounts of money to pay the expense of such resurveys.

See Congressional Globe, Feb. 28, 1845.
5 U. S. Stats. at Large, 762.
9 U. S. Stats. at Large, 95, 368, 530, 611.
10 U. S. Stats. at Large, 204, 565, 660.
11 U. S. Stats. at Large, 86.

By the Act, 5 Statutes at Large, 762, March 3, 1845, $10,-

000 were appropriated "for correction of erroneous and defective surveys in southern Michigan," and by the Act, 9 Statutes at Large, 611, March 3, 1849, $10,000 were appropriated for "correction of erroneous surveys in Michigan," and by the Act, 9 Statutes at Large, September 30, 1850 (two days after the passage of the Swamp Land Grant Act), $20,000 were appropriated for "resurveying and correcting erroneous surveys in Michigan."

(c) Such resurveys of townships in Michigan, the original surveys of which were found to be fraudulent or defective, were begun as early as the year 1843, and were in active progress at the date of the passage of the Act of September 28, 1850, and at the time the Secretary of the Interior made his suggestion or proposition to the State that the lands to which it was entitled by said act should be identified by the evidence of the field notes and plats made from the surveys of the public lands.

The first list of lands made by the Surveyor-General under the instructions given him, hereinbefore quoted, was dated March 29, 1852, and the certificate of the Surveyor-General thereto was as follows, to wit:

"The above list of swamp lands in the Grand River land district, which have been made up in accordance with instructions from the General Land Office, dated November 1, 1850, embraced all lands in said district, *except such as have been found in townships which have been ordered to be resurveyed. The districts reported by Judge Burt and Hiram Barnham to be fraudulent are embraced in this list and marked 'F'.*" * * * * * *

The italics are mine.

The township containing the lands in question was thus marked. *Exhibit 26, Record, p. 36.*

October 4, 1852, the Commissioner of the General Land Office instructed the Surveyor-General as follows, to wit:

"In those townships resurveyed during the past season it will be necessary to furnish new lists, in explanation of the former ones, but you will be careful to designate them as having been made out in lieu of the former ones." *Defendant's Exhibit 83, Record, p. 126.*

Under date of December 8, 1852, the Surveyor-General sent to the General Land Office a supplemental list, based upon the resurvey of certain towns, but failed to designate it as in lieu of former lists covering the same townships, and thereupon, under date of June 7, 1853, the Commissioner of the General Land Office addressed the Surveyor-General a letter of which the following is a copy:

"Sir:—In adjusting the swamp land selections in the Grand River District (Mich.) a difficulty has arisen in regard to the proper construction of the supplemental list transmitted to this office, dated December 8, 1852.

"In the letter of 4th October last, the following directions were given: 'In those townships resurveyed during the past season it will be necessary to furnish new lists, in explanation of the former ones—but you will be careful to designate them as having been made in lieu of the former ones.'

"This instruction seems to have been lost sight of, as the supplemental list above alluded to is simply headed 'Supplemental list of swamp lands in townships resurveyed and platted up to December 6th, 1852, in the Grand River District, embracing some townships not included in former lists,' and no further explanation is given. To illustrate the difficulty I will state that in Township 8, Range 2 North and West, the selections in sections 2, 15, 18 and 19 are the same in both the original list and the supplemental list, and cannot be regarded in any other light than as double selections. In section 24 the whole section was included in the original list, while in the supplemental list the s. ½ of n. w. ¼ n. e. ¼ and s. ½ are the selections.

"Now, which is to govern, the original selection or that in the supplemental list? In Township 9 N., Range 2 West, the selections are in sections 1, 3, 4, 5, 8, 9, 10, 13, 21, 22, 26 and 35 in the original list, while those in the supplemental list are in sections 28, 29, 30, 31, 32, 33 and 35.

"The questions, as you will perceive from the foregoing, are whether the supplemental list is to be regarded as only corrective of the former list, or whether it is to be taken entirely in lieu of the original in the corresponding townships.

"As the work upon this list has been suspended on account of the foregoing difficulties, I have to request that you will give the matter your early attention, and that you will be explicit in your answer, as to the proper construction of said supplemental list." *Exhibit 83, Record, p. 126.*

The Surveyor-General replied to this letter as follows:

"Sir:—Your letter of the 7th inst. has been received.

"In making the supplemental list of swamp lands in townships resurveyed and platted up to December 6, 1852, your instructions of the 4th of October, 1852, were carefully observed, but it should have been stated either at the head of the list, or in the letter transmitting it, that it was intended to be placed on file in your office in lieu of the former list.

"In all cases of resurveys a list of swamp lands is made up from the plats of resurvey without any reference whatever to the old plat or to the original list made out from the old plats.

"The question as to whether the original or the supplemental list should govern, it was supposed would be decided at your office. As the question is submitted, however, it seems to me that the supplemental list, if made at all, should in all cases govern, and in fact it should be placed in lieu of the original list, as the plats of resurveys take the place of the original plats, whenever any plats are made of resurveyed townships.

"In all the lists hereafter to be made up and forwarded, where the original list has already been sent on, the supplemental list will be considered as a substitute for the original, to take its place on the files, making the original

list of no more account than is the plat of the original survey." *Exhibit 92, Record, p. 133.*

After this correspondence, new lists, made on the basis of the resurveys, were expressly stated on their face to be in lieu of former lists covering the same territory.

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(2) *As to the knowledge of the state:*

Just when the fact that the Secretary of the Interior was basing his action upon and making new lists from the field notes and plats of resurveys, and assuming to suspend or correct approved lists, does not appear, but a letter of which the following is a copy is found on file in the office of the Commissioner of the Land Office of the State of Michigan—*Exhibit 119, Record, p. 171:*

"General Land Office.
"February 24, 1855.

"His Excellency Kinsley S. Bingham,
"Governor of Michigan, Lansing, Michigan.

"Sir:—The Surveyor-General of Michigan has transmitted to this office a list of Swamp and Overflowed Lands in the Cheboygan District, Michigan, in townships 'resurveyed and platted,' which list 'abrogates and supersedes all lists of swamp lands heretofore made of the townships contained within it.'

"Said list embraces selections in the following townships, viz:

"Township	21, 23,	Range	4 West.
"	22, 23,	"	5 "
"	22, 23, 24,	"	6 "
"	22, 23, 25,	"	7 "
"	21, 22, 24, 25,	"	8 "
"	22, 23, 24, 25,	"	9 "
"	26,	"	10 "

"The original selections in the foregoing townships made from the defective plats were approved in lists No. 1, 2 and 3, in the Ionia District, Michigan, certified copies whereof were transmitted to your predecessor, January 13, 16 and 18, 1854.

"In consequence of the alteration necessary by reason of the lists recently received, I have the honor to request a suspension of all action upon the lists heretofore furnished you, so far as these several townships are concerned, until the differences can be ascertained and adjusted."

"With great respect
Your ob't servt.,
JOHN WILSON,
Commissioner."

The township containing the lands in dispute is not mentioned in this letter. It had not then been resurveyed, but as hereinbefore shown, it was one of the townships the survey of which had been reported as fraudulent. It was, however, as hereinbefore stated, included in said approved list. *Exhibit 27, Record, p 37.*

The reception of this letter was reported by the Commissioner of the State Land Office to the Legislature of the State by his report for the year 1855, as follows, to wit—*Exhibit 120, Record, p. 172:* (Italics are mine.)

"This office was notified in February last, by letter from the Commissioner of the General Land Office, of the resurvey by the general government of considerable tracts of land, embraced in the lists of swamp lands, including several townships in the northern part of the State, situate principally in the Ionia land district, and the same have been, as directed, marked as suspended on our books. Information has also been received from the Surveyor-General's department, that resurveys of a large number of townships in which swamp lands are included, in the northern part of the State, have been in progress the past season. *Whether any material difference in the quantity of land enuring to the State under the act of Congress, will be effected by such resurveys cannot as yet be ascertained.*"

And the following is an extract from the report of the

said Commissioner for the year 1856: (Italics are mine.)

"Patents are now received for all these lands in the State except those situate in the Ionia land district, comprising about 1,200,000 acres, and for these we are assured the patents will soon be forwarded, *the making of which have been delayed in consequence of extensive resurveys by the general government, which, in some instances, changes the amount and character of the land.*" *Exhibit 118, Record, p. 170.*

A contract for the resurvey of the township in question was made September 17th, 1856,—*Exhibit 122, Record, p. 174*,—and such township was resurveyed during the last quarter of 1856—*Exhibit 114, Record, p. 159*—see p. 168—and May 13, 1858, a new list was made by the Surveyor-General, based upon the evidence of the field notes and plats of the resurvey. This list did not contain the lands in dispute, but did contain land not in the prior list made by the Surveyor-General. *Exhibit 124, Record, p. 175.*

The following is a copy of a letter addressed by the Commissioner of the General Land Office to the Commissioner of the State Land Office—*Exhibit 23, Record, p. 31:*

"General Land Office,
"Dec. 22nd, 1858.

"*S. B. Treadwell, Esq.*, Commr. State Land Office.

"Sir—The subject of the swamp grant of September 28, 1850, so far as the same relates to the State of Michigan, in view of the basis adopted by the State in designating the land granted and the numerous resurveys made since the passage of the law, presents peculiarities which require an action on the part of the authorities of the State

to enable us to adjust the business with proper regard to the evidences in the case. To present the matter is the purpose of this communication.

"The Surveyors-General of the district, from time to time, have reported selections in lists from the evidences of the surveys as originally made. Such selections were examined with the records of this office, and so far as they were found vacant and not interfered with by settlements, were submitted to and approved by the Secretary of the Interior.

"The authorities of the State were immediately thereafter furnished with certified copies of the lists containing the lands thus approved.

"Since such approvals were made and certified, the Surveyors-General, upon the evidences of the resurvey of many townships, have forwarded lists to supersede and abrogate the reports made in townships described therein. These subsequent selections differ materially from the former ones.

"The patents for probably one-half of the townships in this condition, as originally selected and reported, were prepared and transmitted prior to the receipt of the subsequent reports based upon the evidences of the resurveys.

"The balance of the selections originally made, and which are superseded by reports under resurveys, have been approved and certified, but are not carried into patent, nor can they be as thus approved for the reason that the reports made after the resurveys are the only proper evidence upon which our action must be made in determining the grant.

"So far as the patents have been issued it is not intended to make any alteration in the lists, but when the indemnity provisions of the act of 2d March, 1855, come to be executed, a comparison between the reports based upon the original surveys and reports made after resurveys will be made, and where the lands in the original reports do not appear in the subsequent reports, a deduction to that extent will be made from the indemnity certificate. This, it is believed, will be equal justice to all interested.

"The paper herewith inclosed will show in what townships the lands have been patented as first selected, and those townships in which the lands are approved but not patented; and it is forwarded with the request that the

proper authorities of the State may elect to receive the grant, with reference to those townships in which the lands have not been patented, as the selections are made upon the evidences of the resurveys.

"It is our purpose to submit to the Secretary of the Interior, for revocation and approval, so much of the lists, in the several land districts, as embrace the tracts in the condition specified; forwarding at the same time a list of the tracts as subsequently reported for his approval. You will be pleased to present the matters herein contained to the proper State authorities.

"The patents for the swamp lands in Clinton, Ottawa and Newaygo counties, so far as the difficulties above described do not exist, are now in course of preparation, and will be forwarded as soon as they are completed.

"Very Respectfully,
Your obdt servant,
THOS. A. HENDRICKS,
Comm'r."

The inclosed paper—*Record, p. 33*—designated a large number of townships in which the lands reported to the Commissioner of the General Land Office, from the evidence of the original surveys, had been approved and patented to the State, and a large number of townships in which the lands so reported from the evidence of the original surveys had been approved but not patented. The township here in question, to wit, 18 North, 3 West, was in the latter class.

May 15, 1858, part, and February 6th, 1860, the residue of the archives of the office of the Surveyor-General for Michigan were turned over to the Commissioner of the State Land Office, and included amongst the documents so turned over were the field notes and plats of both the original and resurveys of townships in said State and copies of the original and supplemental lists of swamp

lands which had, prior to that time, been forwarded by the Surveyor-General to the General Land Office at Washington. *Exhibit 17, Record, p. 27.*

After said archives of the Surveyor-General's Office were so delivered to the Commissioner of the State Land Office, that officer caused to be made, evidently from a thorough examination of the field notes and plats of both surveys, the said copies of the said original and supplemental lists, and the approved lists and patents up to that time received by the State, a series of statements showing fully and in detail the situation with reference to the adjustment of said grant.

Such examination, and the result of such examination, are shown by the report of the Commissioner of the State Land Office, for the year 1860, to the Legislature at its session for the year 1861—*Exhibit 160, Record, p. 226*—as follows, to wit: (The italics are mine.)

"The complications of the swamp land question between the State and general government, have not been diminished during my administration, and in view of the constantly increasing difficultes produced by delay, I commend them to your particular attention. With much care I have caused to be prepared lists conclusively showing the discrepancies which prevent an adjustment of the questions which have arisen, and add a summary thereof hereto.

"5,857,462.05 acres have been approved to the State, of which 5,049,125.44 acres have been patented, leaving unpatented and unadjusted, 868,336.61 acres. This statement has been made from the approved lists and patents, and is believed to be very nearly correct. But the amounts may be somewhat changed as errors in descriptions are discovered and corrected, and also, the actual amount available, may be materially altered by the discrepancies *between old and resurveys.* 133 townships (74 of which were

patented as approved) were approved by the evidences of the old survey, and are affected by subsequent resurveys. In some of the townships only two or three miles of section line were run. On an average about one-half of the lines in these townships were run, consequently the topography, subdivisions of sections, amount and location, have been in all somewhat, and in some very much altered, the quantity of swamp land generally, being much more on the plats of the old than the resurvey. As the plats of resurvey of these townships were completed, the Surveyor-General, in accordance with the evidences thereof, made (except 7 townships) new lists of swamp land selections from the plats of the resurvey. Of said 7 townships, this office has calculated the amount, and used it for the purpose of this statement, as if given by the Surveyor-General. From this new list, as far as it regards the 74 patented townships, a list has been made of such subdivisions contained therein as are not in the patents, amounting to 67,393.44 acres. The amount given in the patent for said 74 townships is 636,670.89 acres, from which we deduct 2,121 acres that cannot be located without a precedented alteration of the plats of resurvey and 3,986.18 acres that cannot be located at all, and 10,363.64 acres excess in patent over resurvey in such subdivisions as can be located on the plats of resurvey, and add 2,579.49 acres excess in resurvey over patent in such subdivisions as can be located on the plats of resurvey, *and we have left us the available amount patented in said townships 622,779.56 acres, which is 244,476.15 acres more than is contained in the new list in the same townships.** In the remaining 59 townships, which are not yet patented, the amount approved is 306,015.53 acres, while the amount in the new lists thereof is only 225,412.81 acres, being an excess in the approved lists over the amount in the resurvey of 80,602.52 acres, of which, if patented as approved, about 3,000 acres could not be located on the plats of the resurvey.

"We gather from the correspondence, on file in this office, between the State authorities and the department at Washington, that *the general government proposes to adopt throughout the resurvey as the basis of patents.* Aside from the foregoing townships, there remains 187, containing 502,321.28 acres, situated west of range 2 west (except towns 8, 9 and 10, north of range 2 west), in the

*That is, the State had received in these 74 townships 244,476.15 acres of land to which it was not entitled.

northern, northwestern, and western parts of the lower peninsula, which are approved by final surveys, but which are not yet patented. Besides this last amount, five townships near Keweenaw Bay are not yet patented, but are approved by final surveys, and either all or a portion thereof have been reserved by order of the President."

This report having been laid before the Legislature, it was referred to a committee of the House of Representatives, which made a report containing the following, to wit:

"In order to give to the House a better understanding of the whole matter, the committee have prepared a statistical table marked 'B,' whereby it will be seen that the whole amount granted to the State is 5,890,361.49 acres, of which the State has received patents for 5,082,375.94 acres, leaving unpatented, 807,995.55 acres. By reference to the statistical table hereto annexed, the amount in each county will be easily ascertained." *Exhibit 158, Record, p. 222—see p. 223.*

The statistical table mentioned is Exhibit 158, Record, p. 224.

At the same session of the Legislature, and after said report of its committee, an act was passed, of which the following is a copy:

"An act to provide for selecting and locating the unselected deficiency existing in the quantity of lands due to the State of Michigan, under the act of Congress, approved May twentieth, eighteen hundred and twenty-six, and for any other land grant made by act of Congress to this State.

"*Section 1. The People of the State of Michigan enact,* That the Commissioner of the State Land Office be and

he is hereby authorized and directed to cause lands, sufficient to supply the existing deficiency in the quantity accruing to this State, by virtue of the act of Congress, approved May twentieth, eighteen hundred and twenty-six, the ordinance of admission, July twenty-fifth, eighteen hundred and thirty-six, and any other land grant since made to this State by act of Congress, to be selected and located in parcels in conformity with the provisions of the several acts making the same.

"*Section 2.* This act shall take immediate effect.

"Approved March 11, 1861."

Whatever may have been the actual intention of the Legislature, it is beyond question from the evidence that the Commissioner of the State Land Office construed the above-quoted act as authorizing him to adjust with the proper officers of the United States the "complication of the swamp land question," which, as above appears, he had reported to exist.

The evidence that the Commissioner so construed the said act is found in subsequent reports made by him to the Legislature, which reports also showed the progress made from time to time in the adjustment of such "complications," thus:—

The following is an extract from his report for the year 1861:

"A complete list of the unpatented swamp lands, for which the State is justly entitled to patents, by virtue of the act of Congress of the 28th September, 1850, has been made and forwarded to the Commissioner of the General Land Office, with an urgent request that patents issue as speedily as possible. A similar list of the lands denominated 'Green Lands' has been made and forwarded to that department; and we have the assurance of the Commissioner that the matters there referred to shall have as speedy examination and adjustment as the business of his department will allow." *Exhibit 160, Record, p. 228.*

The following from his report for the year 1862:

"It is with great pleasure that I am able to report *that my proceedings under the law of 1861* in relation to the unpatented swamp lands, have met a prompt response from the present Commissioner of the General Land Office, and that we have received patents for 362,463.28 acres, and that in the communication heretofore referred to, the Commissioner informs me that 'we have also prepared patent No. 15, containing 98,691.25 acres; and patent No. 16, containing 72,585.49 acres,' making a total of 533,730.02 acres since last report. This is in the Ionia and Traverse City land districts.

"It is confidently believed that all the questions in relation to our land grants, heretofore unsettled, between the general government and this State, are in progress of a speedy and satisfactory adjustment." *Exhibit 160, Record, p. 228.*

Note the words I have placed in italics.

His report for the year 1864—*Exhibit*—which went to the Legislature at its session in 1865, contains a table which purports to show by counties the condition of the grant as to adjustment, and by such table it appears that the total swamp land to which the State was entitled was 5,891,598.94 acres, of which it had received patents for 5,617,115.08 acres, leaving unpatented 274,483.86 acres, and by such table it appears that all the swamp lands to which the State claimed to be entitled in the county containing lands in controversy in this suit, had already been patented, to wit, Clare.

His report for the year 1865 speaks as follows:

"*Under Act. No. 123, session laws of 1861*, providing for the selecting and locating the existing deficiency of this class of lands due the State by virtue of the act of Congress, approved May 20, 1826, and for all subsequent land grants made by Congress to this State, my immediate predecessor forwarded to the Commissioner of the General Land Office, a carefully prepared list of all deficiencies, as a basis by which the State could select such balances due. This statement was acted upon by the Commissioner of the General Land Office, and transmitted

to this office, where it was again compared and found to disagree in some material points from the plats and records in this office, and it was again forwarded to the General Land Office for comparison and correction, and has not yet been returned to this office; hence no selections on account of the deficiencies have as yet been made."

Suspending quotation from these reports for a few moments:

May 18, 1866, the Secretary of the Interior approved a list of lands made up on the basis of Supplemental List 3—*Exhibit 124, Record, p. 175*—which list included the lands in controversy, and May 26, 1866, a certified copy of this list was forwarded to the Governor of the State of Michigan. *Exhibit 127, Record, p. 178.*

May 31, 1866, the Governor of Michigan acknowledged receipt of the list above mentioned, which was known as approved list No. 10, Ionia, and requested that patents for the lands included in such lists should be issued to the State of Michigan as soon as practicable, conveying the fee simple title thereof to the State. On June 21, 1866, such patent issued. *Exhibit 130, Record, p. 181.*

Following this, the Commissioner of the State Land Office reported to the Legislature at its session commencing January, 1867, as follows, to wit:

"We have received approved lists of about 231,000 acres of the swamp lands, which were omitted in former lists, on account of the difficulty of making the selections, by reason of the changes made *between the old or fraudulent surveys* in some sections of the State, and the resurveys." *Exhibit 160, Record, p. 229.*

And nearly two years later the Commissioner reported as follows, to wit:

"The entire amount of swamp lands conveyed to the State by the act of Congress have been patented, with the exception of 40,000 acres, lying in Cheboygan and Houghton Counties." *Exhibit 160, Record, p. 229.*

Annexed to this report is a tabulated statement showing the condition of the grant up to January 1, 1868. By this statement it appears that on January 1, 1868, the State only claimed as unpatented 35,308.47 acres, situated in Cheboygan County, and 4,295.73 acres situated in Houghton County. Aside from these two counties the entire grant is shown to have been adjusted and patents received.*

November 13, 1869, nearly a year after the last above mentioned report of the Commissioner of the State Land Office, the lands here in dispute were sold by the United States at public auction and purchased by William A. Rust, and May 10th, 1870, patent for such lands issued upon such sale. *Exhibits 38, 39, 40, Record, pp. 60 and 61.*

In the light of this history, I submit that the State must be held to have assented to the course pursued by

*That the method adopted for the identification of the lands to which the State became entitled under the grant of 1850 was excessively liberal toward the State cannot be open to question. Under its operation, within six years after the date of the gift, the State had received patents for over 4,000,000 acres, and more than eighteen years before the beginning of this suit patents for nearly 6,000,000 acres, almost one-sixth of all the lands within its boundaries.

Now, it goes without saying that vast quantities of these lands were not of the character, but of a very much more valuable character than the lands described in the act making the gift; for it is impossible to believe that one-sixth of all the lands within the State are, or were in 1850, swamp and overflowed so as to be unfit for cultivation.

the Secretary of the Interior in withholding from patent lands carried into approved lists upon the evidence of the field notes and plats of the original surveys in townships which were afterwards resurveyed, which, by the field notes and plats of such resurveys did not appear to be swamp.

I cannot better conclude the argument upon this part of the case than by an apt quotation from the opinion of the Court of Appeals of the Sixth Circuit, in the case of the *State of Michigan vs. The Jackson, Lansing & Saginaw Railroad Co. et al.* (69 Fed. Rep., 116). Judge Severens, speaking for the Court, says:

"Whatever may have been the original understanding of the legislature of the State (a matter we have discussed in the former case), it is clear that the State cooperated with the general government in the final adjustment of the grant of 1850 upon the general principle and purpose of reaching the real truth and justice of the matter, and by a method wholly inconsistent with its present contention. By the method thus assented to, it has received a large amount of land which it would not otherwise have obtained, and which, or the proceeds of the sales thereof, it keeps. If there has been a departure from the original intention of the legislature by the agents of the State intrusted with the duty of looking after its interests in the settlement of the grant, the course pursued has been public and open. It would seem that what was well known to those at all conversant with the general subject, and being of facts and transactions extending through so many years, should be regarded as known to the State. But it is not necessary to rely upon presumptions. Express knowledge was communicated to successive legislatures by the reports of the Commissioner of the State Land Office, and messages from the executive. It was informed, as early as 1869, that by the method which had been pursued, and with which it had been previously made acquainted, the land grant had been practically adjusted and substantially closed up. It had then received the 'nearly 6,000,000 acres of swamp lands,' which Governor Crapo said, in his message to the

legislature in 1867, 'were donated to the State by the act of Congress of 1850.' That communication indubitably showed the understanding of the governor to be that the State had then acquired substantially all the lands due to it under the grant."

III.

As to the Act of March 3d, 1857.

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1. It is questionable at least if lists made by a Surveyor-General from field notes and plats, for the information of the Secretary of the Interior, to enable him to identify lands in favor of the State by the use of such field notes and plats for such identification, or lists approved by the Secretary of the Interior in such a case, are "selections" within the meaning and intent of said act of March 3rd.

The purpose of that act was to confirm to the States lists which constituted selections made by them, and with reference to which the Secretary of the Interior had delayed and neglected to act.

In speaking upon this subject in *Tubbs vs. Wilhoit*, 138 U. S., 137, Mr. Justice Field says.

"In consequence of the delay in certifying the lists and the inconveniences which followed, the legislatures of several States, in which such lands existed, undertook to identify the lands and dispose of them, and for that purpose passed various acts for their survey and sale and the issue of patents to purchasers. The conflicts which thus arose between parties claiming under the State, and parties claiming directly from the United States, led

to various acts of Congress for the relief of purchasers and locators of swamp and overflowed lands. * * * Act of March 3, 1857." * * *

Now, no such situation as this existed in the State of Michigan. There had been no such delay and neglect of the Secretary of the Interior as to call for any remedial legislation from Congress. The record shows that the Secretary of the Interior had proceeded in identifying the lands to which the State of Michigan was entitled, with reasonable diligence, and that the only reason why he had failed to issue patents to the State for lands in townships containing the lands in dispute was, as I have above indicated, the fact that the original survey had been reported as fraudulent, and that a resurvey was under consideration and intended to be had.

But if this contention should be held not sound, then—

2. It is clear, I submit, that said act of March 3, 1857, cannot be held to apply to a situation like the one under consideration.

That situation was this, to wit: The Surveyor-General had made a list from the field notes and plats of a survey of the township containing the lands in dispute, which survey had been reported fraudulent and a resurvey of which was in contemplation, and, inadvertently it would seem, this list had been used by the Secretary of the Interior in making a list which he approved. After making such approval, however, and after a copy of such approved list had been sent to the Governor of the State, action upon it had been by the Secretary suspended: that is, the issue of patents withheld, and a contract for the resurvey of the township entered into and such township resurveyed. *Exhibit 123, Record, p. 174.*

Now it is, I submit, incredible that Congress intended to disregard this situation, and to confirm lands to the State according to a survey and plat which had been declared fraudulent and superseded by a new survey and a new plat.

IV.

Upon the facts disclosed by the evidence with reference to the Acts of the United States and the State upon the subject of the adjustment of the grant by the Act of 1850, the State is estopped to assert that by said Act, or the actions of the Secretary of the Interior in performing the duties imposed upon him thereunder, or by said act of March 3, 1857, the title to the lands in dispute passed to it, and said estoppel binds plaintiff as grantee of the State.

Even if it could reasonably be contended that lands situated as those in dispute in this case were within contemplation of the Act of 1857, yet I submit that the State is estopped to claim said lands thereunder.

The State, as the evidence shows, was advised of the intention of the United States not to recognize such act as applicable and not to issue to the State patents for the lands in question, and it permitted the United States to carry that intention into effect and to make other disposition of said lands.

In answer to this proposition that the State is estopped, the learned counsel for the plaintiff in error assert that—"It is settled law in this State that under its statutes, title to land cannot pass by estoppel *in pais*, nor can an equitable defense be set up to defeat the legal title," and they cite as supporting this assertion Ryder vs. Flanders, 30 Mich., 336, and Hayes vs. Livingston, 34 Mich., 383.

I quote from counsel's brief in the court below. At this writing I have not been favored with their brief for this court.

Now:

(1) Such is not the settled law of this Court—*Dickinson vs. Colgrove, 100 U. S., 578, 580, 584; Kirk vs. Hamilton, 102 U. S., 68, 78.*

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(2) We contend for no doctrine inconsistent with these propositions as illustrated and applied by the cases cited.

The first of the propositions applies, and only applies, when the party setting up the estoppel relies upon a title derived from the party against whom the estoppel is invoked; and the second to a case where the legal title is admittedly in the plaintiff and the defendant sets up an equitable title.

But we do not claim to derive our title to the lands in dispute from or through the plaintiff by estoppel or otherwise, nor do we set up an equitable defense to defeat a legal title conceded or proven to be in the plaintiff. We base our title upon patents from the United States.

The plaintiff's contention is that before the issue of such patents the title had passed from the United States to it, and to sustain such contention alleges:

(1) That the lands in dispute were swamp and over-

flowed within the meaning of the Act of Congress of September 28th, 1850.

(2) That if they were not so in fact, they were adjudged to be so by the action of the Secretary of the Interior.

(3) That selections of the lands in dispute as swamp lands had been made and reported to the office of the Surveyor-General prior to March 3rd, 1857, and that therefore the Act of 1857 confirmed title in the State.

We answer, that the State, by its action, is estopped:

(1) To contend that the lands in dispute were of the character described in said Act of Congress of September 28th, 1850;

(2) To contend that the Secretary of the Interior made the adjudication upon which it relies; and

(3) To prove that selections of the lands in dispute had been so made and reported prior to March 3, 1857.

In other words, our contention is that the State is estopped to assert the existence of certain facts *in pais*, the existence of which is essential to its contention that the legal title to the lands in dispute ever vested in it; and I submit that no case can be found inconsistent with our right to thus invoke the doctrine of estoppel.

Again, counsel for plaintiff contend that there can be no estoppel unless there has been fraud or deception or gross negligence amounting to fraud on the part of the

party sought to be estopped, and insists that that is not the case here. Now:

1. There are exceptions to this proposition. See per Field, J., in *Brant vs. Virginia Coal and Iron Co., 93 U. S., 326.*

2. An element of fraud or gross negligence on the part of the State of Michigan does, in fact, appear here; as thus:

If, when the Legislature of the State was advised that the Secretary of the Interior was proceeding to revise lists which he had approved and was making new lists on the basis of the resurveys, it did not intend to assent, it was, on its part, either fraud or gross negligence amounting to fraud, to permit the Secretary to proceed in that regard without protest upon its part.

On the other hand, if the Legislature did intend to assent, it would now operate as a fraud upon innocent parties purchasing from the United States to permit it to repudiate such assent.

It will, I presume, be contended, and authorities cited in support of such contention, that the doctrine of estoppel *in pais* cannot be invoked against a State. But I am happy to be able to say that whatever may be ruled elsewhere in that regard, the Supreme Court of Michigan refuses to recognize as sound a principle which affirms that the State is not subject to the *laws of common honesty* in its dealings with reference to property and property rights, and hence that it can repudiate the conduct of its agents acting with apparent authority on its behalf, no matter how long it has, through all its departments, acquiesced in such conduct, and enjoyed the benefit of its

results, or however inequitable the consequences of such repudiation may be.

Attorney-General vs. Ruggles, 59 Mich., 123, was an information seeking to have certain part-paid certificates for the purchase of land from the State delivered up to be canceled, on the charge that they had been obtained to be issued by fraud. It appeared that a prior suit which had been instituted for a like purpose had been, by certain State officers, settled and discontinued. In this case it was sought to avoid such settlement on the allegation of want of authority in the State officers to make such settlement, and that they had been imposed upon and deceived as to the facts. The relief asked was denied. In the course of the opinion Morse, J., says (the italics are mine):

"I have no doubt of their (the State officers in question) power to make such settlement. *The State must have some agent or agents through which it may act. It cannot be a myth. Its officials must, from the very nature of things, have power to conclude it.* As heretofore shown, the Legislature granted unreserved power to the land grant board to dispose of these lands. Its authority to do so is not denied. This board, by its acts and its acquiescence, empowered the Commissioner to make these sales."

Again: "As far as these lands now in suit are concerned, there has been a full settlement, and the money paid by defendants is in the State treasury. There ought to be some time when a man's liabilities can be ended, after payment of all that is asked by the officials representing the State. *I see no reason to distinguish this case, although the State is a party, from like cases between individuals.*"

State vs. F. & P. M. R. R. Co., 89 Mich., 481. This was a bill in equity by the State seeking to quiet its title to a large amount of land. The State claimed the lands in controversy under the same act of Congress and by entirely similar action of the Secretary of the Interior and the General Land Department and of the State as it claims the land in controversy here. The court below decreed in favor of the State, but upon appeal this decree was reversed and the bill dismissed. The opinion was unanimous. The only question considered was that of estoppel. Justice Grant, speaking for the court, says:

"That the State, as well as individuals, may be estopped by its acts, conduct, silence and acquiescence is established by a line of well-adjudicated cases."

He then cites and comments upon some eight or nine cases, * including the case of *Attorney-General vs. Ruggles, supra*, and then:—

"Applying the principles of the above cases and and others that might be cited, to the present case, I can find no escape from the conclusion that *the claim of the complainant has become stale, and that it is now estopped to assert to title in itself. The claim of the State has no foundation in equity, justice or good conscience.*"

A further quotation from the opinion of Judge Severens in *State of Michigan vs. Jackson, Lansing & Saginaw R. R. Co., supra*, is apt in this connection:

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*Among the cases so cited are the following, which, as here, arose out of dealings of States with two different land grants, to wit:

Penegra vs. Munz, 29 Fed. Rep., 830. See p. 836.
Cahn vs. Barnes, 5 Fed. Rep., 326. See p. 334.
Hough vs. Buchanan, 27 Fed. Rep., 328.

And to the proposition "that the law of estoppel in a proper case applies to the government, *U. S. vs. McLaughlin*, 30 Fed. Rep., 147, and per Brewer, J., in *U. S. vs. M., K. & T. Ry. Co.*, 37 Fed. Rep., 68, 71.

"It is a rule devised for the protection of the public that the State shall not be held responsible for the acts of its agent when done in excess of his powers. Assuming, for the moment, that there was an excess of power by the officers of the State, what is the application of the above-stated rule to the circumstances as we now find them? It is a fit rule to apply to a transgression which the State has not condoned; but it has no application to a case in which no question of morals is involved, but where a course of action has been pursued with the knowledge and acquiescence of the State in the management and disposition of its property interests for so long a time that the public have been led to reasonably believe that they may act upon the assumption that what has been done with the sanction of the State was validly accomplished. To apply the rule as the State asks us to apply it here would be to pervert it to an agency for mischief and wrong. The public have supposed, and had a right to suppose, that they could deal with the lands in the State upon the status given them by the action of the public officials of the State and of the United States, without dissent from either government. In a justly inspired confidence in the integrity and validity of this public action, several hundred thousand acres of land in the State have been bought from the United States by citizens who are bona fide purchasers, and whose titles are mere nullities if this contention of the State can be maintained. It was for the public interest that the status of the lands should be settled, and that they should not remain as stumbling blocks in the progress of the improvement of the country. The State cannot be permitted to say that it has slept during all this long period and abandoned its sovereign duties to its citizens, as well as its reciprocal moral obligations to the government which had made it so magnificent a gift. The State is not to be regarded as a mere machine, incapable of intelligence or conscience. And while it is necessary and right to restrain or annul the unauthorized acts of its agents by which its interests might be impaired, yet there must come a time, after long-continued acquiescence in public action with knowledge of it, when, in the interest of its citizens, the State itself shall be precluded from despoiling others by the assertion of its original rights."

It is true that the Ruggles case and the case of the State of Michigan vs. Jackson, Lansing & Saginaw R. R. Co., from the opinion in which the above is quoted, were on the equity side of the court, but if, as I have above contended, estoppel in pais can be availed of by the defendant in an ejectment suit, the doctrine of those cases and of that opinion is applicable here.

V.

Counsel for plaintiff in error allege errors in various rulings of the Court with reference to the admission and exclusion of evidence; but if the arguments that we make upon the propositions we discuss are sound, these rulings are immaterial. The result in the court below should have been the same had they been made in favor of plaintiff.

ASHLEY POND,

Of Counsel for Defendants in Error.

OPINION

MICHIGAN LAND AND LUMBER COMPANY *v.* RUST.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

No. 57. Argued October 25, 26, 1897. — Decided December 13, 1897.

The act of September 28, 1850, c. 84, granting swamp lands to the several States, was a grant *in præsenti*, passing title to all lands which at that date were swamp lands, but leaving to the Secretary of the Interior to determine and identify what lands were, and what lands were not, swamp lands.

Whenever the granting act specifically provides for the issue of a patent, the legal title remains in the Government until its issue, with power to inquire into the extent and validity of rights claimed against the Government.

Although a survey had been made of the lands in controversy which indicated that they were swamp lands, it was within the power of the land office at any time prior to the issue of a patent to order a resurvey and to correct mistakes made in the prior survey.

The facts in this case clearly show an adjustment of the grant upon the basis of the resurveys, and their acceptance by the officer of the State charged by the act of Congress with the duty of so doing, and this makes such adjustment final and conclusive.

The act of March 3, 1857, c. 117, did not operate to confirm to the State of Michigan the title to all lands marked on the approved and certified list of January 13, 1854, as swamp and overflowed lands, and direct the issue of a patent or patents therefor, but it simply operated to accept the field notes finally approved as evidence of the lands passing under the grant, leaving to the land department to make any needed corrections in the surveys and field notes.

The decision in *Martin* v. *Marks*, 97 U. S. 345, does not conflict with this construction of the act of 1857.

This was an action of ejectment commenced in the Circuit Court of the United States for the Eastern District of Michigan on February 11, 1888. On November 28, 1892, the case came on for trial before the court and a jury. At the close of the testimony the jury, under the instructions of the court, returned a verdict for the defendants. On May 7, 1895, this judgment was affirmed by the Court of Appeals, 31 U. S. App. 731, and to review such judgment the case was brought

Counsel for Plaintiff in Error.

here on writ of error. The land in dispute is situated in Clare County, being the S. E. ¼ of S. E. ¼ of sec. 20; N. W. ¼ of S. W. ¼ of sec. 21; N. W. ¼ of S. E. ¼ of sec. 22; N. W. ¼ of N. W. ¼ of sec. 28; N. ½ of S. W. ¼ of sec. 29; N. ½ of N. E. ¼ of sec. 35, township 18, range 3 W.; and E. ½ of S. W. ¼ of sec. 1, township 18, range 4 W., and amounting to 400 acres, the undivided half of which only was claimed by plaintiff.

The contention of the plaintiff, generally speaking, is that this was swamp land, and granted to the State of Michigan by the act of Congress of date September 28, 1850, c. 84, 9 Stat. 519, granting swamp lands to the several States; that it was included in a list of such lands in the Ionia land district, approved by the Secretary of the Interior and forwarded to the governor of Michigan on January 13, 1854; that the act of March 3, 1857, c. 117, 11 Stat. 251, confirmed the action of the Secretary of the Interior, and thereby passed the title to the State of Michigan, by which State it was, on October 14, 1887, conveyed to plaintiff's grantor.

The defendants, on the other hand, contend that the original surveys of the public lands in the State of Michigan were erroneous; that, at the instance of the State, Congress ordered resurveys, which resurveys were carried on from the years 1842 to 1857; that, while it is true this land was by the original surveys classed as swamp land and included in the Ionia land district list approved and certified to the State of Michigan, the resurveys showed that it was not land of that description; that a new list for that district, not including this land, was in 1866 made out and certified to the State; that such new list was accepted by the State as correct, and a patent for the lands described therein issued to and received by it; that after all this had taken place and in 1870 the land in question was sold by the officers of the United States at auction after public advertisement and that patents were duly issued upon such sale, under which patents the defendants claim title.

Mr. Frank S. Robson and *Mr. A. B. Browne* for plaintiff

in error. *Mr. J. W. Champlin* and *Mr. A. J. Britton* were on their briefs.

Mr. Benton Hanchett and *Mr. Ashley Pond* for defendants in error.

Mr. Justice Brewer, after stating the case, delivered the opinion of the court.

This case involves questions of the power of the land department over the matter of the identification of the particular lands passing under the swamp land act of 1850, of the finality of the action of the Secretary of the Interior in approving and certifying to the Governor of the State a list of such lands, and of the effect of the confirmatory act of 1857. There is no testimony showing what was in fact the condition of the land, whether swamp or not, at the time of the passage of the act of 1850, and the case turns wholly upon the documentary evidence.

The act of 1850 made a grant *in præsenti;* in other words, the title then passed to all lands which at that date were swamp lands, and the only matters thereafter to be considered were those of identification. *Railroad Company* v. *Smith*, 9 Wall. 95; *French* v. *Fyan*, 93 U. S. 169; *Martin* v. *Marks*, 97 U. S. 345; *Rice* v. *Sioux City & St. Paul Railroad*, 110 U. S. 695; *Wright* v. *Roseberry*, 121 U. S. 488; *Tubbs* v. *Wilhoit*, 138 U. S. 134. But while the act operated as a grant *in præsenti*, the determination of what lands were swamp lands was entrusted to the Secretary of the Interior. Section 2 contains this provision:

"That it shall be the duty of the Secretary of the Interior, as soon as may be practicable after the passage of this act, to make out an accurate list and plats of the lands described as aforesaid, and transmit the same to the governor of the State of Arkansas, and, at the request of said governor, cause a patent to be issued to the State therefor; and on that patent, the fee simple to said lands shall vest in said State of Arkansas, subject to the disposal of the legislature thereof."

It may be remarked in passing that while the first and second sections refer specifically to the State of Arkansas, section 4 of the act makes it applicable to all the States. It is true that in the first section Congress defines the lands granted as "swamp and overflowed lands, made unfit thereby for cultivation;" and section 3, referring to the lists and plats ordered by section 2 to be made out by the Secretary of the Interior, contains this further specification as to the character of the lands granted:

"That in making out a list and plats of the lands aforesaid, all legal subdivisions, the greater part of which is 'wet and unfit for cultivation,' shall be included in said list and plats; but when the greater part of a subdivision is not of that character, the whole of it shall be excluded therefrom."

But while Congress thus defined what it intended to grant as swamp and overflowed lands it entrusted, as appears from section 2, the identification of those lands to the Secretary of the Interior.

It will be perceived that the act contemplated the issue of a patent as the means of transferring the legal title. In *Rogers Locomotive Works* v. *American Emigrant Co.*, 164 U. S. 559, 574, it was said, speaking in reference to this matter, and after a full review of the previous authorities: "When he" (that is, the Secretary of the Interior) "made such identification, then, and not before, the State was entitled to a patent, and 'on such patent' the fee simple title vested in the State. The State's title was at the outset an inchoate one, and did not become perfect, as of the date of the act, until a patent was issued."

Generally speaking, while the legal title remains in the United States, the grant is in process of administration and the land is subject to the jurisdiction of the land department of the Government. It is true a patent is not always necessary for the transfer of the legal title. Sometimes an act of Congress will pass the fee. *Strother* v. *Lucas*, 12 Pet. 410, 454; *Grignon's Lessee* v. *Astor*, 2 How. 319; *Chouteau* v. *Eckhart*, 2 How. 344, 372; *Glasgow* v. *Hortiz*, 1 Black, 595; *Langdeau* v. *Hanes*, 21 Wall. 521; *Ryan* v. *Carter*, 93 U. S.

78. Sometimes a certification of a list of lands to the grantee is declared to be operative to transfer such title, Rev. Stat. § 2449; *Frasher* v. *O'Connor*, 115 U. S. 102; but wherever the granting act specifically provides for the issue of a patent, then the rule is that the legal title remains in the Government until the issue of the patent, *Bagnell* v. *Broderick*, 13 Pet. 436, 450; and while so remaining the grant is in process of administration, and the jurisdiction of the land department is not lost.

It is, of course, not pretended that when an equitable title has passed the land department has power to arbitrarily destroy that equitable title. It has jurisdiction, however, after proper notice to the party claiming such equitable title, and upon a hearing, to determine the question whether or not such title has passed. *Cornelius* v. *Kessel*, 128 U. S. 456; *Orchard* v. *Alexander*, 157 U. S. 372, 383; *Parsons* v. *Venzke*, 164 U. S. 89. In other words, the power of the department to inquire into the extent and validity of the rights claimed against the Government does not cease until the legal title has passed. "A warrant and survey authorize the proprietor of them to demand the legal title, but do not, in themselves, constitute a legal title. Until the consummation of the title by a grant, the person who acquires an equity holds a right subject to examination." *Miller* v. *Kerr*, 7 Wheat. 1, 6. After the issue of the patent the matter becomes subject to inquiry only in the courts and by judicial proceedings. *United States* v. *Stone*, 2 Wall. 525, 535; *Moore* v. *Robbins*, 96 U. S. 530; *United States* v. *Schurz*, 102 U. S. 378, 396; *Bicknell* v. *Comstock*, 113 U. S. 149, 151; *Iron Silver Mining Co.* v. *Campbell*, 135 U. S. 286; *Williams* v. *United States*, 138 U. S. 514. This jurisdiction of the department has been maintained in cases of preëmption where the entire purchase money has been paid and a receiver's final certificate issued. *Orchard* v. *Alexander*, 157 U. S. 372, and cases cited in the opinion; *Parsons* v. *Venzke*, 164 U. S. 89.

In *Knight* v. *United States Land Association*, 142 U. S. 161, is a full discussion by Mr. Justice Lamar of the power of the Secretary of the Interior over proceedings in respect to the

disposition of public lands, and on page 178 it is said, as illustrative of the scope of that power: "For example, if, when a patent is about to issue, the Secretary should discover a fatal defect in the proceedings, or that by reason of some newly ascertained fact the patent, if issued, would have to be annulled, and that it would be his duty to ask the Attorney General to institute proceedings for its annulment, it would hardly be seriously contended that the Secretary might not interfere and prevent the execution of the patent. He could not be obliged to sit quietly and allow a proceeding to be consummated, which it would be immediately his duty to ask the Attorney General to take measures to annul." And, again, on page 181 is this language: "The Secretary is the guardian of the people of the United States over the public lands. The obligations of his oath of office oblige him to see that the law is carried out, and that none of the public domain is wasted or is disposed of to a party not entitled to it. He represents the Government, which is a party in interest in every case involving the surveying and disposal of the public lands." See also *Orchard* v. *Alexander*, 157 U. S. 372, 381, 382; *Warner Valley Stock Company* v. *Smith*, 165 U. S. 28, 34. This jurisdiction extends to the ordering of new surveys whenever in the judgment of the department there has been error or fraud in those already made. *Cragin* v. *Powell*, 128 U. S. 691. In *Tubbs* v. *Wilhoit*, 138 U. S. 134, 143, the court quoted with approval this passage from a letter of the Secretary of the Interior: "There can be no doubt but that under the act of July 4, 1836, reorganizing the general land office, the Commissioner has general supervision over all surveys, and that authority is exercised whenever error or fraud is alleged on the part of the surveyor general." And in *New Orleans* v. *Paine*, 147 U. S. 261, the question was presented as to the power of the department to order a new survey, and on page 266 the rule was thus stated: "If the department was not satisfied with this survey, there was no rule of law standing in the way of its ordering another. Until the matter is closed by final action, the proceedings of an officer of a department are as much open to review or reversal by himself,

or his successor, as are the interlocutory decrees of a court open to review upon the final hearing." So, notwithstanding that a survey had been made and that such survey indicated that the land in controversy was swamp land, and, therefore, passing under the act of 1850 to the State of Michigan, it was within the power of the land department, at any time prior to the issue of a patent, of its own motion, to order a resurvey, and correct by that any mistakes in the prior survey.

But in this case it is not necessary to rely alone on the general power vested in the land department, for as early as 1842 the attention of the legislature of Michigan was called to the fact that there had been errors in the surveys of public lands within the State, and a resolution was passed by it in these words:

"Whereas, it has been satisfactorily made to appear to this legislature that large districts of lands lying within the limits of the State of Michigan have been returned by some of the deputy United States surveyors to the general land office as surveyed, where no surveys whatever have been made, or where the surveys have been so imperfectly done as to be utterly valueless; and whereas, the United States surveyor general of this land district has caused the lands so represented as surveyed to be offered for sale, to the very great injury of the State of Michigan and the citizens thereof; therefore,

"*Be it resolved by the Senate and House of Representatives of the State of Michigan*, That the President of the United States be requested to cause the subdivisions of the following townships of land, situate within the State of Michigan, and which have been represented to have been surveyed, but which have either not been surveyed or have been so imperfectly surveyed that said work is valueless, to be surveyed at as early a day as may be consistent, viz.:

* * * * *

"*Resolved*, That the governor be requested to transmit the foregoing preamble and resolution to the President of the United States." Laws Mich. 1842, No. 8.

A letter, enclosing a copy of this resolution, was forwarded to the Commissioner of the General Land Office, and by him

referred to the President, who endorsed it as follows: "Let the matter be referred to the surveyor general, with instructions as indicated, and let the Governor of Michigan be informed of the measures to be adopted." Thereupon proceedings for new surveys were taken by the land department, of which fact the Governor of the State was duly informed. It is true that in the resolutions of the Michigan legislature 81 townships were specifically named, and that the land in controversy was not included within those townships, but it appears that on the strength of the information thus furnished the land department proceeded to make new surveys of other lands than those specifically mentioned by the legislature, and the attention of Congress having been called to the matter, it from 1845 to 1856 inclusive made appropriations for correcting surveys in the State of Michigan. Act of March 3, 1845, c. 71, 5 Stat. 752, 762; Act of August 10, 1846, c. 175, 9 Stat. 85, 95; Act of March 3, 1849, c. 100, 9 Stat. 354, 365; Act of September 30, 1850, c. 90, 9 Stat. 523, 530; Act of March 3, 1851, c. 32, 9 Stat. 598, 611, 612; Act of March 3, 1853, c. 97, 10 Stat. 189, 204; Act of August 4, 1854, c. 242, 10 Stat. 546, 565; Act of March 3, 1855, c. 175, 10 Stat. 643, 660; Act of August 18, 1856, c. 129, 11 Stat. 81, 86. The last three appropriations were made after the sending of the approved list for the Ionia land district to the Governor on January 13, 1854.

It may be noticed here, in passing, that in the adjustment of the swamp land grant for the State of Michigan the land department did not include in one list all the swamp lands within the State, but made out several lists, apparently one at least for each land district.

Not only was there general knowledge on the part of the authorities of the State, as of those at Washington, of the existence of errors and mistakes in the original surveys of public lands in the State of Michigan, but also was there particular information as to supposed errors in the surveys of the land in controversy. After the passage of the act of 1850 the Commissioner of the general land office instructed the surveyor general of the State of Michigan to examine the

field notes of the surveys on file in his office and report therefrom a list of the lands which were swamp or overflowed. From time to time the surveyor general forwarded to the land department lists in accordance with these instructions. On March 29, 1852, he forwarded a list containing the land in question, and in the letter accompanying is found this language: "The districts reported by Judge Burt and Hiram Burnham to be fraudulent are embraced in this list and marked 'F'," and in that list the district containing the land in controversy is marked with the letter "F," so that upon the records of the general land office was to be found information that the survey of this particular land was reported to be erroneous, and as such was likely to be included in resurveys then pending. The report of the commissioner of the state land office to the legislature of the State, for the year ending November 30, 1856, contains this statement: "Patents are now received for all these lands in the State except those situate in the Ionia land district, comprising about 1,200,000 acres, and for these we are assured the patents will soon be forwarded, the making of which have been delayed in consequence of extensive resurveys by the General Government, which, in some instances, changes the amount and character of the land." And again, after speaking of the application for the purchase of particular tracts, he says they have been denied, because "no valid sale could be made until after a compliance with the law requiring advertisement of a public offering to be published in each county of the State; and such public sale or offering has not been deemed advisable until after the title of the State to the grant should be wholly confirmed by the issue of the patents, and the numerous corrections and restatements of the lists necessary to be previously made by the department at Washington." And still again: "It is well known that many tracts, and sometimes almost entire sections, are now considered as among the best of farming lands, or extensively covered with pine and other valuable timber."

Upon the resurveys the land in controversy was shown not to be swamp and overflowed land, and lists conforming to these new surveys were duly approved and certified by the

Secretary of the Interior and forwarded to the Governor of the State of Michigan; the receipt of such lists was acknowledged and a request made for patents for the lands described therein, and patents were issued and accepted conveying such lands.

These facts indicate very clearly an adjustment of the grant upon the basis of the resurveys. Undoubtedly the beneficiary of such a grant is interested in its adjustment and may properly be heard before the officers of the grantor in determining what lands are embraced within it, and any assent by the grantee to a determination made by the officers of the grantor as to the lands passing within the grant would be binding upon it. In this case the grant was for the benefit of the State of Michigan, but in the act of 1850 making the grant, Congress, as it had a right to do, clearly indicated the officer of the State, to wit, the Governor, whose action in the premises should be the action of the grantee. Under these circumstances, it being known that there were errors in the surveys, and the legislature of the State having requested action to be taken to correct these errors, and resurveys having been undertaken, and while they were being prosecuted for the purpose of correcting such errors, a list of lands, which by the original surveys appeared to be swamp and overflowed, was made out and forwarded to the Governor. Upon the records of the land department the original survey of the district containing the land in controversy was at that time challenged as fraudulent. After the list containing this land had been forwarded to the Governor and his request for a patent returned to the land department, a patent was issued not including this land. Subsequently the resurveys were finished and according to them this land was excluded from the grant. Thereupon a new and corrected list containing the lands, which by the resurveys were shown to be swamp and overflowed, was made out, approved by the Secretary of the Interior and forwarded to the Governor. Upon its receipt the Governor requested patents to be issued, and patents were issued conveying the lands specified therein. This clearly shows an acceptance by the officer of the State, charged under the act of Congress with the duty of so doing, of the resurveys as within the

authority of the land department, and makes the adjustment of the grant upon the basis of such resurveys final and conclusive. The act of the State in accepting the new and corrected survey as the basis of adjustment is tantamount to a waiver of any claims under the prior and erroneous survey, for it cannot be that a grantee accepting a patent for lands which according to a final and correct survey are shown to be within the terms of the grant can thereafter be heard to say, Notwithstanding I have taken all the lands shown to belong to me by this correct survey, I also claim lands which by a prior and erroneous, if not fraudulent survey, appeared to pass under the grant. He cannot in that way enlarge the scope of the grant, and after taking lands which are finally determined to pass under the grant say, I also insist upon lands which upon such final survey are shown not to be within the grant, simply because under a prior erroneous survey they appeared to be within its terms.

We come now to consider the effect of the act of March 3, 1857, c. 117, 11 Stat. 251, which provided:

"That the selection of swamp and overflowed lands granted to the several States by the act of Congress . . . heretofore made and reported to the commissioner of the general land office, so far as the same shall remain vacant and unappropriated, and not interfered with by an actual settlement under any existing law of the United States, be and the same are hereby confirmed, and shall be approved and patented to the said several States, in conformity with the provisions of the act aforesaid, as soon as may be practicable after the passage of this law: *Provided, however*, That nothing in this act contained shall interfere with the provisions of the act of Congress entitled 'An act for the relief of purchasers and locators of swamp and overflowed lands,' approved March the second, eighteen hundred and fifty-five, which shall be and is hereby continued in force, and extended to all entries and locations of lands claimed as swamp lands made since its passage."

It is contended by the plaintiff that the purpose and effect of this act were to confirm to the State of Michigan the title to all lands marked on the approved and certified list of Jan-

uary 13, 1854, as swamp and overflowed lands, and to direct the issue of a patent or patents therefor. Whatever question might have existed, were it not for this act, as to whether any of the lands marked on such lists were swamp and overflowed lands, and whatever authority there might otherwise be in the land department to make corrections, Congress, which had full power over the matter, by it in terms granted to the State these lands; such action by Congress was a finality; thereafter no inquiry could be made as to the character of the lands; no correction of the list; and the full equitable title passed to the State, beyond the possibility of challenge. It is insisted that Congress must have known of the alleged irregularities in the surveys; known of the approval by the Secretary of the Interior of this list; that it had been forwarded to the Governor; that the Governor had accepted and requested the issue of patents; and with this knowledge passed this act, intending thereby to remove all question as to the character of the lands, to put an end to the necessity for any further examination, and to make this list the single and absolute evidence of the lands it was granting to the State of Michigan. There would be force in this contention if the act of 1850 contained simply a grant to the State of Michigan, and there were but a single list of swamp lands in that State. It might then well be said that this act was passed with reference solely to the conditions existing in respect to this attempted selection of swamp and overflowed lands in that State, but the act of 1850 was a grant to all the States, and the act of 1857 must, therefore, be construed as applicable to the conditions existing in all of the States. It is contended by the defendants that it applies only to those States in which the state authorities had attempted to make selections of swamp and overflowed lands within their limits, and had communicated such selections to the land department, and that its purpose was simply to confirm to the States lists which constituted selections made by them, and with reference to which the Secretary of the Interior had delayed and neglected to act; and they refer to the opinion of this court in *Tubbs* v. *Wilhoit*, 138 U. S. 134, 137, in which it is said:

"In consequence of the delays in certifying the lists and the inconveniences which followed, the legislatures of several States, in which such lands existed, undertook to identify the lands and dispose of them, and for that purpose passed various acts for their survey and sale and the issue of patents to purchasers. The conflicts which thus arose between parties claiming under the State and parties claiming directly from the United States led to various acts of Congress for the relief of purchasers and locators of swamp and overflowed lands. Act of March 2, 1855, 10 Stat. 634, c. 147; act of March 3, 1857, 11 Stat. 251, c. 117."

This argument is entitled to consideration because the word "selection" applies more naturally to the action of the grantee in reporting to the land department the lands which it claims, than to the action of the land officers in identifying from the field notes what are and what are not swamp and overflowed lands. The term "selection" is not an apt word to describe the identification of certain lands according to evidence presented of their character. But we need not rest on this. Conceding that the statute applies not merely to those cases in which affirmative action had been taken by the States, but also to those in which without any such action the only proceedings had been those in the land department of the United States, still we think that it cannot be held that this act is to be construed as expressing a purpose to make the list in this case, approved and certified to the State, a finality as to the lands passing under the grant and an absolute transfer of the equitable title.

In order to fully understand the matter attention must be called to the act of 1850. That granted, as has been seen, swamp and overflowed lands, and directed the Secretary of the Interior, as soon as practicable, to make an accurate list and plats of such lands and transmit the same to the Governor, and thereafter, at his request, cause a patent to be issued. The manner in which the Secretary should discharge this duty, the evidence that should be required by him as to the character of the lands, were not prescribed by the act; the matter was left to his discretion. The Secretary sent out

instructions to the surveyor general of the State of Michigan to make lists of the unsold swamp lands, as shown by the field notes on file in his office. From these instructions we quote this passage: "The only reliable data in your possession, from which these lists can be made out, are the field notes of the surveys on file in your office, and if the authorities of the State are willing to adopt these as the basis of those lists, you will so regard them; if not, and those authorities furnish you satisfactory evidence that any lands are of the character embraced by the grant, you will so report them." On receipt of a letter containing notice of this from the surveyor general the Governor replied that he did not have authority to incur any expense in the matter, and afterwards referred it by message to the legislature, which body, by act passed June 28, 1851, Laws of Michigan, 1851, p. 322, adopted the surveys on file in the surveyor general's office as the basis of adjustment. The effect of this legislative action was not to make an erroneous survey conclusive nor to preclude the land department from the exercise of its unquestioned jurisdiction to correct surveys, but simply to accept the field notes finally approved as the evidence of the lands passing under the grant, leaving to the land department to make any needed corrections in the surveys and field notes. In other States different action was taken by the state authorities, as appears from the opinion of this court in *Tubbs* v. *Wilhoit*, *supra*. Now, the obvious purpose of this act of 1857 was to ratify and confirm the various steps taken by the Secretary of the Interior in the selection of swamp and overflowed lands. It was general in its terms, reaching to all the States, and the different modes by which identification of the swamp and overflowed lands had been attempted to be accomplished. It cannot fairly be construed as intending to put an end to all further inquiry in the land department, nor to oust that department of jurisdiction to inquire into and correct any frauds or mistakes, but was a general ratification and confirmation of the methods pursued. It cannot be supposed that Congress intended by this act to condone all frauds, to prevent the correction of errors or mistakes, to take every-

thing as it then appeared on the records of the land department, and, forbidding any further inquiry, declare that lands which by such records, through error or fraud, appeared to be swamp and overflowed, should be granted to the State. It was not an act to enlarge the grant of 1850. It was not an act to oust the land department of its ordinary jurisdiction to inquire into and ascertain what were swamp and overflowed lands, but was an act confirming and ratifying the methods thus far pursued. Congress must have been aware of the fact that there were charges of fraud or mistake in reference to the surveys in the State of Michigan. It had appropriated large sums for resurveys. They had partially been made, and mistakes, if not frauds, had been found. It does not appear that such charges existed in reference to the surveys in other States; at any rate, it is not to be presumed that all surveys in all the States were fraudulent or erroneous, and it would require very clear and direct language before the intent could be imputed to Congress to ignore the existence of alleged frauds and errors in the one State and to confirm titles to lands in that State based upon such fraudulent or erroneous surveys, and thereby enlarge, perhaps very materially, the amount of the grant to such State. The language of the act does not compel any such conclusion as to the intent of Congress.

The decision in *Martin* v. *Marks*, 97 U. S. 345, does not conflict with this construction of the act of 1857. It is true this language is found in the opinion: "After the passage of that act the land department had no right to set aside the selections." But in that case there was no question of the power of the land department to correct errors or mistakes. The plaintiff relied on a list made by the surveyor general of Louisiana of swamp and overflowed lands, which list, containing the land in dispute, had been forwarded to the general land office, and there filed. It did not appear that this list had been formally approved by the Secretary of the Interior, as contemplated by the act of 1850. The defendant relied on a patent from the United States, issued long thereafter. It was held that the act of 1857 dispensed with the formal approval by the Secretary of the Interior, and confirmed the lists made

and filed with the commissioner of the general land office. And in view of that fact, and as no question had been made in the land department of the correctness of the survey, it was adjudged that the equitable title of the State to the land was perfect. So, in this case, if there had been no challenge of the original surveys, no attempt at a resurvey or to correct errors or mistakes, and there had been simply a lack of the formal approval of the list by the Secretary of the Interior, that case would have compelled an adjudication that the full equitable title had passed to the State of Michigan, and would have invalidated the patent subsequently issued by the United States directly to the parties under whom the defendants claim. But that is far from deciding that all power in the land department to inquire into frauds or errors in the surveys was taken away and all frauds upon the Government in such surveys condoned. It was merely a decision that as the identification by the surveyor general of the land as swamp land had not been challenged for fraud or mistake, it was binding on the question of title, and the approval by the Secretary of the Interior and the issue of the patent were simply ministerial acts. See also *Blanc* v. *Lafayette*, 11 How. 104.

We see no error in the judgment of the Court of Appeals, and it is, therefore,

Affirmed.